IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1405 124

WILLIE S. GRIGGS, et al.,

Appellants,

against

DUKE POWER COMPANY, a Corporation,

Appellee.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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Interest of the *Amicus*

The State of New York, in 1945, was the first State to enact a fair employment practices law addressed to the elimination and prevention of discrimination in employment based on race, creed, color or national origin.[1] The New York anti-discrimination laws[2] are based on the con-

[1] New York Laws of 1945, Chap. 118.

[2] New York Executive Law §§ 290-301.

viction that practices of discrimination because of race, creed, national origin, or sex undermine the institutions and foundation of a free democratic state and menace the peace, order, and general welfare of the state and its inhabitants.

New York State has also endeavored to afford its inhabitants equal opportunity in employment by its efforts to insure that individuals seeking admission to apprentice training programs shall have their qualifications appraised solely according to objective criteria which permit review.[3]

More recently, however, it has become increasingly apparent that though the era of overt racial discrimination may be near an end, more subtle and sophisticated modes of excluding racial minorities have emerged to threaten progress toward equal opportunity. In the wake of recently enacted federal and state laws barring overt discrimination in employment there is an increasing resort to the use of objective employment criteria which, however, include unnecessary, non-job-related requirements. The use of these irrelevant standards has the same prejudicial effect as past overt discriminatory practices in denying equal opportunity to members of minority groups.

In order to effectuate the purposes of New York's anti-discrimination laws and to prevent such laws from being rendered ineffective, the Attorney General and the New York State Division of Human Rights have sought to eliminate hiring, promotional, and union admission standards which have no valid relation to job requirements and which operate to disqualify members of minority

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[3] New York Executive Law § 296 subd. 1-a; *see also State Commission on Human Rights* v. *Farrell,* 43 Misc. 2d 958, 252 N.Y.S. 2d 649 (Sup. Ct. 1964).

groups because of the effects of past discrimination and current cultural and socio-economic patterns.[4]

Consistent with the basic purpose of the 1964 Civil Rights Act, the federal Equal Employment Opportunity Commission has also required that employment standards pertaining to hiring, transfer or promotion must be significantly related to performance on the job.

The instant case presents an issue of great significance in its potential impact on the struggle of minority groups for equality of opportunity. The issue is no less than whether the employment provisions of the 1964 Civil Rights Act are to be read as providing an employer with a virtual *carte blanche* to adopt any educational and test requirements regardless of how irrelevant to the job they may be and regardless of how they may operate to the disadvantage of minority groups, or whether the provisions are to be interpreted in the light of the basic anti-discriminatory purpose of Title VII and construed so as to effectuate rather than undercut such purposes.

The decision below by the Fourth Circuit Court of Appeals casts doubt as to the future effectiveness of the 1964 Civil Rights Act in the elimination of employment discrimination. The New York State Attorney General believes that the outcome of this litigation cannot fail but be so pervasive in its effect as to have an impact even on state efforts to eliminate artificial barriers in the way of

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[4] *Lefkowitz* v. *Kerr,* Case C-15335 (New York State Division of Human Rights, unreported 1967) in which a three year residency requirement for admission to the New York City steamfitters apprenticeship program was stricken as not being job-related. See also *Lefkowitz* v. *Marks,* Case C-15939 (N. Y. SDHR unreported 1968), in which a two year math requirement and the use of "bonus points" for academic high school courses were stricken as not being related to the work requirements of the apprenticeship program of the Westchester-Fairfield County Electricians Joint Apprenticeship Committee and, therefore, not a valid "objective criterion."

equal opportunity. The ability to use tests without requiring that they be shown to be a reasonable measure of the ability required to perform in the particular job which the applicant seeks would open the door for many employers and labor unions to circumvent Federal and State anti-discrimination laws by adopting tests which screen out a disproportionate number of persons of minority groups who may nevertheless be fully qualified to perform the actual job. Similarly, if formal educational requirements may be imposed in situations where the relationship of such requirements to satisfactory job performance is unknown to the employer, then the way will be clear to discriminate against Negroes and other groups on the basis of racial disadvantages created by past educational discrimination.

It is in recognition of the challenge posed by this case to the potency and effectiveness of the fair employment provisions of our own quite similar anti-discrimination law, that the Attorney General of the State of New York files this brief in support of the petitioners in accordance with Rule 42 of this Court.

Question Presented

Is an employer's use of psychological tests and high school equivalency requirements as employment criteria prohibited by Title VII of the 1964 Civil Rights Act when such criteria (A) operate to exclude a great proportion of Negroes from jobs for which they may be well qualified while having a relatively minor exclusionary effect upon whites, and (B) bear no relation to the requirements for satisfactory performance in a particular job or class of jobs?

Statement of the Case

This is an appeal from a judgment of the United States Court of Appeals, Fourth Circuit, decided January 9, 1970,

which affirmed in part and reversed in part, a decision of the United States District Court for the Middle District of North Carolina dismissing a complaint on the merits brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 e, *et seq.*

The appellants herein, Negro employees of Duke Power Company, at its Dan River Steam Station, filed a complaint, on March 15, 1966, with the Equal Employment Opportunity Commission charging that the company was discriminating against them on the basis of race.

After investigation, the Commission found reasonable cause to believe that the company was in violation of Title VII of the Civil Rights Act of 1964 and notified each plaintiff of his right to sue under § 706(e).

Thereafter, a class action was brought in the District Court challenging the validity of the company's transfer and promotion system under Title VII of the Civil Rights Act of 1964.

Appellants alleged that Duke's transfer and promotion system, which requires a high school education or satisfactory scores on general intelligence tests in order to transfer from its "outside" jobs in the plant, constitutes an improper and discriminatory employment practice effectively denying them equal opportunity in employment.

The District Court in a Memorandum Opinion, 292 F. Supp. 243, dismissed the complaint holding that the high school education requirement does not discriminate against Negro employees on the basis of race, and that the tests used by appellee are professionally developed ability tests within the meaning of section 703(h) of Title VII.

The United States Court of Appeals Fourth Circuit reversed the District Court as to its holding that Negroes hired before 1955 (when the high school requirement was

instituted) were not entitled to injunctive relief, but affirmed as to all Negro employees hired after the 1955 requirement was adopted. *Griggs* v. *Duke Power Co.*, 420 F. 2d 1225 (4th Cir. 1970).

The Duke Power Company operates a generating plant at Draper, North Carolina, known as the Dan River Steam Station. The work force at the plant is divided into five departments: Operations, Maintenance, Laboratory and Test, Coal Handling, and Labor Departments. Until 1966 the practice of Duke was to relegate all its Negro employees to the Labor Department which consists of janitorial and maintenance services, where the maximum wage is less than the minimum paid to any white employee. Duke's high school education and alternative testing requirements are now imposed on the all Black Labor Department as a condition for transfer even to coal-handling, the other "outside" department where the work consists of unloading, crushing, weighing and carrying coal.

POINT I

Duke's educational and testing criteria are unlawful because they are based on racial characteristics while lacking any business justification rooted in a relationship to the demands of the work to be performed.

A. The discriminatory impact of these superficially neutral educational and testing standards.

Duke's transfer requirements are racially discriminatory in two important respects. First, beneath the facade of even-handedness the requirements will be seen to operate as a double standard based on race. Second, even if the criteria applied to *all* employees they would nevertheless be unlawful because they are based on racial characteristics and are without business justification.

1. *Duke's double standard based on race.*

Duke's employment criteria apply only to those employees in so-called "outside" jobs who are seeking to transfer to the better, higher paying "inside" jobs and to those in the all black labor department seeking promotion to the other two "outside" departments, coal handling and watchmen. Employees who were in "inside" jobs before the requirements were imposed are exempt from meeting them either as a condition of retaining their job or as a prerequisite to further advancement. Of course all current employees who were in "inside" jobs prior to 1955 when the high school requirement was first imposed are white. Such is the case because Duke overtly discriminated on the basis of race, relegating Negroes to the Labor Department up until 1966. While it is true that some whites are subject to the transfer requirements, it is clear that the disadvantage is borne primarily by Negroes. It is they who find themselves today in the lowest paying Labor Department rather than in "inside" jobs because of their race and Duke's past discriminatory practices. It is they who must meet the requirements even to transfer to the other two "outside" departments. No white must meet the requirement to transfer out of the Labor Department because there are no whites in the Labor Department. Until recently it has been an employee's racial status which has determined departmental placement and progression. By instituting transfer requirements for certain departments and granting exemptions to others Duke is in fact placing its white employees in a superior position. It has granted a preference to those in inside department—a preference available on the basis of race since Negroes were in the past precluded from inside jobs.

Title VII § 703(a) (2), 42 U.S.C. § 2000 e-2(a) 2, makes it an unlawful employment practice for an employer—

> "to limit, segregate, or *classify his employees in any way which would deprive or tend to deprive any indi-*

> *vidual of employment opportunities* or otherwise adversely affect his status as an employee, because of such individual's race, . . . " (Emphasis supplied)

We do not here assert that the provisions of Title VII retroactively apply to Duke's practices before July 2, 1965, the effective date of the Act. But, to the extent that Duke's present employment criteria classify Negroes adversely because of the inferior position they occupied during past years of overt discrimination, they are clearly prohibited by the Act. *Quarles* v. *Phillip Morris, Inc.*, 279 F. Supp. 505 (E. D. Va. 1968). The Act prohibits Duke from relying upon the very racial disadvantage it created by its past discrimination in order to perpetuate the consequences of its past discriminatory practices. *Quarles, id.*

In *Quarles,* restrictive departmental transfer and seniority provisions were considered by the Court. At issue there, as in the instant case, was whether such provisions "are unlawful employment practices because they are superimposed on a departmental structure that was organized on a racially segregated basis." *Quarles* at page 510. As to the question whether present consequences of past discrimination are covered by the Act, the Court answered in the affirmative:

> "The plain language of the act condemns as an unfair practice all racial discrimination affecting employment without excluding present discrimination that originated in seniority systems devised before the effective date of the act." *Quarles* at page 515.

Duke has here accorded to certain departments exemption from its educational and testing criteria. Those who entered the exempt departments before the criteria were imposed did so at a time when the opportunity was racially restricted. May Duke now effectively preserve the

past discriminatory pattern by imposing standards which place greater burdens on Negroes? In *Quarles,* Judge Butzner answered unequivocally in language apposite to the instant situation:

> "It is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act." 279 F. Supp. at 516.

The *Quarles* decision was expressly followed by Judge Heebe in *United States* v. *Local 189,* 282 F. Supp. 39 (E. D. La. 1968), where he held that a job seniority system (not unlike the one involved *Quarles* in its result) violated Title VII because it "perpetrates the consequences of past discrimination." Accord *Hicks* v. *Crown Zellerbach Corp.,* 58 Lab. Cas., para. 9145 (E. D. La. 1968); *Dobbins* v. *IBEW,* 292 F. Supp. 413 (S. D. Ohio 1968). See also *Vogler* v. *McCarty Inc.,* 294 F. Supp. 368 (E. D. La. 1967), aff'd 407 F. 2d 1047 (5th Cir. 1968).

Duke's transfer requirements are analogous in their invidious effects upon Negroes to other practices in civil rights contexts which have been stricken down by the Courts. Perhaps the paradigm example is the use of the so-called Grandfather Clause to grant a preference to white voters—the law was unanimously overturned by this Court in *Guinn* v. *United States,* 238 U. S. 347. More recently a neutrally phrased transfer plan which would have perpetuated school segregation by vitiating the effects of school rezoning was overturned by this Court without dissent. *Goss* v. *Bd. of Education,* 373 U. S. 683, 83 Sup. Ct. 1405. See also *Lane* v. *Wilson,* 307 U. S. 268; *United States* v. *Dogan,* 314 F. 2d 767 (5th Cir. 1963); *Ross* v. *Dyer,* 312 F. 2d 191 (5th Cir. 1963).

2. *The unlawful use of criteria based on racial characteristics.*

We have so far contended that Duke's transfer requirements constitute an unlawful double standard insofar as they do not apply to all employees but grant an exemption and thereby give preference to white employees on the basis of a status unavailable to Negroes due to racially discriminatory practices prior to the effective date of Title VII. But, even if these criteria were imposed upon all employees without exception, they would violate Title VII because they lack business justification. Duke has never shown how or why a high school education is needed for unloading, crushing, or carrying coal—the actual demands of jobs in the coal handling department. To impose such a requirement in the absence of such a showing is to prefer whites over Negroes without business necessity. The preferential effect is easily demonstrated. As of the 1960 census only 12% of North Carolina Negro males had completed high school whereas 34% of North Carolina white males had done so. Against this background it can be seen that the imposition of the educational requirement creates an almost 3 to 1 preference for whites—a preference bottomed on race.

Performance on generalized "intelligence" or "aptitude" tests such as the standardized tests used by Duke is today recognized to be closely related to educational and cultural background. See e.g. *Hobson* v. *Hansen,* 269 F. Supp. 401 (D. D.C. 1967), aff'd sub. nom., *Smuck* v. *Hobson,* 408 F. 2d 175 (D. C. Cir. 1969 *en banc*); *Arrington* v. *Massachusetts Bay Transportation Authority,* 306 F. Supp. 1355 (D. C. Mass. 1969).[5] Moreover, in areas where Negroes have been most deprived of educational and cul-

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[5] *See Generally* Cooper and Sobel, *Seniority and Testing Under Fair Employment Laws, A General Approach to Objective Criteria of the Hiring and Promotion,* 82 Harv. L. Rev. 1598 (June 1969) [hereinafter cited as Cooper and Sobel].

tural opportunity the disparity between average white score and average Negro score is greatest. In one instance, 58% of whites passed a battery of standardized tests while only 6% of blacks passed. (The Wonderlic and Bennett tests employed by Duke herein were among the tests included.) Decision of EEOC, cited in CCH Empl. Prac. Guide, para. 1209.25 (Dec. 2, 1966).

It is clear from the foregoing that Duke's educational and testing requirements have an adverse impact on Negroes because of their race. But this fact in itself might not, without more, constitute a violation of Title VII. Rather it is the racially discriminatory impact of these criteria coupled with the fact that they are unrelated to the demands of the job to be performed which renders them invalid under Title VII. Such criteria can not be justified by business necessity.

B. The need for a relation between the criteria and satisfactory job performance.

It is well settled that employment practices fair in form but discriminatory in substance are proscribed by Title VII. Superficially "neutral" standards which favor whites but do not serve business needs cannot stand. *Quarles* v. *Phillip Morris, supra; Local 189* v. *United States,* 416 F. 2d 980 (5th Cir. 1969); *Local 53 of International Association of Heat and Frost Insulators and Asbestos Workers* v. *Vogler,* 407 F. 2d 1047 (5th Cir. 1969).

Duke's standards might serve business needs if they could reasonably predict future performance in the job. Thus, for example, an employer may properly give a stenographic or typing test to measure ability and likely future performance of applicants for secretarial positions. Such a test would be proper and lawful even if, due to past disadvantages, certain minority groups fared poorly on it. But may an employer use such a test to hire

janitors where the test operated to exclude more Negro applicants than whites?

The standardized general intelligence tests administered by Duke clearly are not so obviously related to the demands of its jobs as a typing skills test is related to the job of a typist. The Wonderlic Personnel Test, one of the two tests challenged herein, includes arithmetic, vocabulary and verbal reasoning questions[6] which may measure an applicant's formal educational achievment without predicting his job performance in an industrial situation. A noted industrial psychologist specializing in aptitude testing, Dr. Edwin Ghiselli of the University of California, reviewed the evidence concerning whether standardized aptitude tests can predict job performance and felt compelled to conclude that as to trades and crafts the aptitude tests "do not well predict success on the actual job" and in industrial settings "the general picture is one of quite limited predictive power".[7] This conclusion has been underscored by many studies of the predictive value of intelligence tests scores.[8] One such study, conducted in a large aluminum plant in the south showed that although Negroes scored only half as well as whites on the Wonderlic Test they performed just as well as whites on the job.[9] The implications of the foregoing example are clearly apposite here: Duke's use of the Wonderlic and Bennett tests is screening out Negroes without business necessity.

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[6] E. Wonderlic, Wonderlic Personnel Test Form I (1959).

[7] E. Ghiselli, *The Validity of Occupational Aptitude Tests,* 51, 57 (1966).

[8] *See* Cooper and Sobol, *supra,* note 5, 1643-1646.

[9] Mitchell, Albright & McMurry, *Biracial Validation of Selection Procedures in a Large Southern Plant,* in *Proceedings of the 76th Annual Convention of the American Psychological Ass'n* (1968), at 575.

The need then is for proper study before deciding what tests or other standards should be used and then evaluating the results obtained in the light of the employee population and its performance on the jobs. Since Duke admittedly has not undertaken to "validate" the tests it uses, it is merely speculating as to their efficacy and simply hoping that they will be related to business needs. But even the manual for the Wonderlic Test used by Duke unequivocally states:

> "the examination is not valuable unless it is carefully used, and norms are established for each situation in which it is to be applied."[10]

The Equal Opportunity Commission which is responsible for the administration and implementation of Title VII has insisted that standards imposed as conditions for transfer must be *job-related* in order to be valid. The EEOC has ruled that tests are unlawful "* * * in the absence of evidence that the tests are related to specific jobs and have been properly validated * * *." Decision of EEOC, Dec. 2, 1966, reprinted in CCH, Employment Practices Guide, para. 17, 304-53. Two federal district courts have supported this position. *United States* v. *H. K. Porter,* 296 F. Supp. 40 at 78 (N. D. Ala. 1968); *Dobbins* v. *Local 212, IBEW,* 292 F. Supp. 413 (S. D. Ohio 1968).

The Commission's position that job-relatedness is a *sine qua non* of any valid employment testing standards is the only interpretation of 703(h) which is compatible with, and which gives affect to 703(a). Any other construction of 703(h) opens the way for gross evasions of the statute. The Circuit Court's rejection of job-relatedness as a criterion of validity enables any employer to create job preferences in favor of whites. An employer may easily achieve such a discriminatory effect by adopting criteria

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[10] Wonderlic Personnel Test Manual 2 (1961).

which are based on cultural and educational differences caused by a history of deprivation even when such criteria are irrelevant to the question of whether a job can be adequately done.

For further reasons discussed in Point II below, the Circuit Court's rejection of the Commission's position was unwarranted. Nevertheless, while not requiring Duke's educational and testing criteria to be job-related in order to be valid, the Circuit Court did seem concerned with whether the criteria served business needs. It was satisfied in this regard by Duke's assertion that the transfer requirements were instituted in response to the growing complexity of its business, and that the standards were adopted to determine whether an employee has sufficient intelligence to enable him to be promoted upward toward supervisory positions. Duke pointed out that it has long had the policy of training and promoting its own employees into supervisory positions.

As to such alleged business necessity, it should first be noted that it is improper for Duke to adopt standards addressed to only a few supervisory positions which only a relatively small number of employees may eventually rise to. Most employees will not become supervisors. It is manifest therefore that Duke has no justification for excluding Negroes from jobs for which they are qualified simply because there are a few higher, supervisory jobs for which they may not be qualified.

The Office of Federal Contract Compliance dealt with this problem in its administration of Executive Order 11,246, 3 C.F.R. 339 (1964-69 com.) which prohibits discrimination by government contractors. That agency requires that when a hiring test is based on possible promotion to other jobs, promotion must not be a remote possibility but must be probable "within a reasonable period of time and in a great majority of cases" 33 Fed. Reg. 14392, § 2(b) (1) (1968).

Secondly, quite compelling evidence against Duke's claim of business necessity is that the Company is quite willing to retain and promote many white employees who have not met these educational and testing standards.

The third and most important reason why Duke's claim of business necessity should be rejected is that it is ultimately based on the idea that although these tests are not related to the particular job the employee is now seeking, they are valid as to a position he may eventually rise to. But job-relatedness has not been shown even as to such higher level positions.[11] Indeed, Duke has not demonstrated that its educational and testing requirements are relevant as to any job. They were adopted without proper study and evaluation. Duke's hope that these criteria will help in selecting more capable employees for middle and higher level jobs is not grounded in any meaningful study of the relevance or validity of these standards as to such jobs. Duke's standards have never been related to performance in any of the jobs in the Company. The Company's assertion that the educational and testing criteria serve business needs is therefore mere speculation. Discriminatory standards cannot be upheld when they stand on such a weak foundation.

POINT II

Duke's use of discriminatory, non-job-related employment criteria derives no protection from § 703-h of Title VII.

The testing provision of Title VII of the Civil Rights Act of 1964 provides that "any professionally developed ability test" the results of which are acted upon by an

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[11] Testing to predict successful job performance in higher positions is subject to the same shortcomings as is testing for low level jobs. *See* E. Ghiselli, *supra,* note 7, at 34-36, 49-51.

employer is lawful if "its administration or action upon the results is not designed, intended or used to discriminate because of race." 42 U.S.C. § 2000e-2(h). As interpreted by the Fourth Circuit, the clause permits the use of any professionally created test, provided it is not designed or intended to discriminate. *Griggs* v. *Duke Power Co.*, 420 F. 2d 1225 (4th Cir. 1970). We support appellants' contention that this interpretation is in error.

The phrase "professionally developed" may refer to any type of test, from general intelligence to specific learned skills. The crucial inquiry, is whether the tests are put to the purpose for which they were created. There would be little business sense in asking agricultural laborers to demonstrate through test performance the same level of verbal ability as editorial assistants. "Using aptitude tests to determine eligibility for employment or the order of hiring is certainly justified if there is a relationship between the aptitude tested and the demands of the work to be performed." *Arrington* v. *Mass. Bay Transportation Authority,* 306 F. Supp. 1355 (D. C. Mass. 1969). But the use of non-job-related criteria, when it results in the disqualification of a greater number of minority-group persons, deprives both employers and the community of potential talent. Business needs are not served, and the results of such exclusion serve to unlawfully perpetuate past discrimination. *United States* v. *Sheet Metal Workers,* 416 F. 2d 123 (8th Cir. 1969); *Local 53 Asbestos Workers* v. *Vogler,* 407 F. 2d 1047 (5th Cir. 1969).

An essential clarification of the term "professionally developed" as the phrase appears in § 703(h) is contained in an Equal Employment Opportunity Commission release: *Guidelines on Employment Testing,* CCH, Employment Practices Guide, para. 16,904 (1966). The Commission there interprets a "professionally developed ability test" as one which "fairly measures the knowledge or skills required by the particular job or class of jobs.

The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII." An additional recommendation in the *Guidelines* suggests that testing be viewed as but one component of the total evaluation of a potential employee, particularly "when an applicant has not enjoyed equal educational opportunities." It is urged that these *Guidelines* should be acccepted by this Court. The lower courts' rejection of the Commission's *Guidelines* is contrary to established judicial principles. Commission *Guidelines* have been accorded great weight in cases arising from Title VII's prohibition against discrimination because of sex or religion. *Dewey* v. *Reynolds Metal Co.*, 304 F. Supp. 116 (D. C. Mich. 1969); *Weeks* v. *Southern Bell Telephone Co.*, 408 F. 2d 228 (5th Cir. 1969). This Court has determined that in similar situations, "when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965).

The majority of the Circuit Court claimed to have relied upon the legislative history as a factor in its consideration of the weight to be given to the EEOC's Guidelines and the proper meaning to be accorded § 703h. Debate over testing reflects the Senate's preference for a business necessity standard for employment testing. In response to a decision by the Illinois Fair Employment Practice Commission, *Myart* v. *Motorola*,[12] Senators Clark and Case issued a memorandum examining the impact of Title VII on testing. *Motorola* had been interpreted as invalidating any test which resulted in the exclusion of more Blacks than Whites. Responding to this conception, Clark and

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[12] Decided on February 26. 1964. The decision is reproduced in 110 Cong. Rec. 5662-64 (1964).

Case found "no requirement . . . that employers abandon *bona fide qualification tests* where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups." (Emphasis supplied) 110 Cong Rec. 7213 (1964). "Business need" and qualifications both entail a selection process which promotes the most talented in terms of job-related skills. It can be seen therefore that Senate discussion of ability testing assumed a business necessity and qualification appproach.

The testing amendment, 703(h) is the final outcome of the debate generated by *Motorola*. Senator Tower sponsored it to make it clear that the extreme implications of *Motorola* would not be incorporated into Title VII. Senator Tower's first proposal introduced the standard of whether the test could "determine or predict whether . . . [an] individual is suitable or trainable with respect to his employment in the particular . . . enterprise." 110 Cong. Rec. 13492. The impact of the amendment was that a fair test examining an employee's ability to perform a job would not be struck under Title VII. We believe this amendment would have provided a fair clarification of the role of testing consistent with the spirit of the law. However, the amendment as written was rejected as redundant. 110 Cong. Rec. 13505. Senator Tower then submitted a shorter version, this time omitting the earlier specific reference to business needs or qualifications. This later amendment passed with the support of the floor leader, Senator Humphrey, who said "Senators on both sides of the aisle who were deeply interested in Title VII have examined the text of this amendment and have found it to be *in accord with the intent and purpose of that title.*" 110 Cong. Rec. 13724 (1964) (Emphasis supplied 110 Cong. Rec. 13505. Clearly implied in the clause is the business necessity standard referred to by both Tower's original amendment and the Clark-Case memo-

randum. The final clause reflects the concern of its supporters that the act mst not be read as barring *fair* tests to assess *job qualifications.*

The Court below, in rejecting this view of legislative history, added that the defeat of a more explicit amendment in 1968 supported its position. That proposal, calling for a standard of direct job-relation, was only a small part of a larger bill which would have granted the EEOC the authority to issue judicially enforceable cease and desist orders.[13]

As Congress declined to enhance the powers of the Commission, the Bill was not enacted. The legislative history of 703(h) then indicates a legitimate concern that employers be permitted to obtain qualified employees, capable of doing the job through the use of fair testing.

To be held unlawful under Title VII, a test must be "designed, intended or *used to discriminate*" (emphasis supplied). The requisite "intent" as contemplated by this statute may be inferred from the act of knowingly administering a test, or setting a requirement, unrelated to the demands of the job, which has the effect of excluding a minority group. It cannot be doubted that Duke has knowingly and voluntarily adopted the criteria here in question, that it is aware that the standards operate to exclude a disproportionate number of Negroes, and that it admits to having adopted the standards without studying whether they were related to the jobs. Such conduct is "intentional" within the meaning of the act. *United States* v. *H. K. Porter Co.,* 296 F. Supp. 40, 115 (N. D. Ala. 1968); *Clark* v. *American Marine Corp.,* 304 F. Supp. 603 (E. D. La. 1969); *See also Local 189 Papermakers* v. *United States,* 416 F. 2d 980 (5th Cir. 1969); *Dobbins* v. *Local 212 IBEW,* 292 F. Supp. 413, 443 (S. D. Ohio 1968).

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[13] See S. 3465 90th Cong., 2d Sess. § 6(c) (1968).

Moreover, what ever the company's intent, it cannot be questioned that the tests are in fact *used* to discriminate and therefore proscribed by Section 703(h).

Duke's transfer requirements therefore violate § 703(h) in three important respects: (1) they are not "professionally developed" within the meaning of the Act, (2) they are intended as a means of discriminating on the basis of race, and (3) they are "used to discriminate because of race". If the Court is persuaded as to any one of above then Duke's criteria should be held to be outside the protective scope of 703(h).

Affirmance of the Circuit Court opinion would be contrary to the over-all intent and purpose of the Act. To interpret 703(h) as permitting any test provided it is professionally created would allow invidious classifications based on racial characteristics, a direct violation of 703(a). Thus, to adopt any other standard than job-relatedness would render Section 703(h) inconsistent with 703(a) and thereby impede progress towards the goal of equal employment opportunity. Judge Sobeloff, eloquently dissenting in *Griggs,* carefully posed the issue: it is "whether the Act shall remain a potent tool for equalization of employment opportunity or shall be reduced to mellifuous but hollow rhetoric." *Griggs* v. *Duke Power Co.,* 292 F. Supp. 243. As it has been appropriately stated by the United States Court of Appeals, Eighth Circuit: "it is essential that exams be objective in nature, that they be designed to test the ability of the applicant to do the work usually required . . . and that they be given and graded in such a manner as to permit review." *United States* v. *Sheet Metal Workers,* 416 F. 2d 123 (8th Cir. 1969).

CONCLUSION

The decision of the Circuit Court sustaining the validity of Duke's employment criteria should be reversed.

Dated: New York, New York, August 11, 1970.

Respectfully submitted,

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